CONSTITUTIONAL LAW, § 300
Syllabus
Professor Doernberg
Spring Term 2014

INTRODUCTION

The law’s vagueness bedevils first-year students. Most students arrive at law school with at least an unconscious idea that the law is fixed and certain. That is (not at all regretably) not the case. If the law worked that way, we could simply feed the relevant data\(^1\) into a computer; the computer would churn out the answer, and all of us would have to find something else to do with our lives. The law does not work that way, however, which is a good thing. If it did, it would quickly acquire a Procrustean rigidity that, while it might have the advantage of predictability, would often produce bad results—that is, results with which we as a society are uncomfortable. I certainly do not suggest that predictability is without value. It is, however, no more than a second-order value. The first-order value to which we all aspire is very hard to define, but it has something to do with amorphous concepts like “justice,” “fairness” and “procedural regularity.”

Every case begins with a client with a problem. Law is our society’s attempt to make possible the peaceful resolution of problems, and that often requires a fair amount of creativity. Largely for that reason, the law is not fixed and immutuable; it is always a work in progress. When a new kind of problem surfaces, we try to devise a solution with which society can live. Sometimes legislatures address problems in the first instance, but often the courts do so through the common law. As time goes on and more cases arise, we may tinker with the solution to make it work better, or, in some circumstances, we may discard it completely and try something totally new.

Constitutional Law is a particular challenge in this respect. In large part, it requires a different type of thinking than any of the courses you took during the fall semester. That does not mean that the analytical skills you acquired are of no use; they certainly are. Studying Constitutional Law, however, challenges us to use those skills in different ways. It is almost invariably a mistake to think of “rules” of Constitutional Law. It is not nearly as “neat,” if you will as your first-semester subjects. For example, it is wonderful to be able to recite the elements of a compulsory counterclaim under \textit{FED. R. CIV. P. 13(a)}, but you will rarely, if ever, find something that straightforward in Constitutional Law. You are acquiring and honing new mental processes. Like any form of training, it can be uncomfortable at times because you are (I hope) stretching yourselves to increase your capacity. View it as a training process, similar to training for a marathon. You will not “get it” all at once; no one does. (That includes your professors.) Be patient with yourselves and your colleagues. Let us reason together.

CLASS REQUIREMENTS

A. Class Attendance

You should plan to attend every class; that’s part of your job as a law student. Part of my job is to make the classes worth your time and effort. I will circulate a sign-in sheet at the beginning of each class. If the sheet doesn’t make it around to where you are sitting, please stop at the lectern on your way out of class to sign in. I will fill in the names of stu-

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\(^1\) Even here one must make judgments, and a computer cannot make them. What \textit{are} the relevant data? What makes a datum relevant or not?
students who forget to sign in if I remember seeing them, but in a class as large as ours, I may certainly overlook some.

If you encounter difficulties such as illness or personal or family emergencies that make it impossible for you to attend on a particular day, please let me know, preferably in advance, whether by telephone, e-mail or a personal message, so that I don’t think you’re just blowing the class off. You must attend at least 80% of the classes, which translates to five permitted absences. If you have a sixth unexcused absence, you will not be allowed to take the final examination. Let’s not go there.

B. Class Preparation

I expect you to be on time, thoroughly prepared, and ready to participate in classroom discussion. (If you think about it, that’s probably pretty much what you expect from me.) If you are not prepared for a particular class (and it happens), you must notify me before the class begins. (I don’t necessarily need to know why; I don’t want to pry. I do however, want to avoid the embarrassment that accompanies being called on when one is unprepared and the waste of class time that is an inevitable concomitant of that.) If you have not notified me in advance and are not prepared when called on, I will direct the Registrar to reduce your score on the final examination. There is no need to risk that, however; all it takes to avoid it is a simple notification. I have never had to deduct points from an examination in the thirty-five years I have been teaching.

Thorough preparation is essential. On the other hand, it is not useful for you to “read ahead,” even if you somehow feel that you have the time. It will make things harder rather than easier. That is because we are building a structure, and we need to have the foundation in place before beginning the first floor. If you are trying to read material before we have discussed the preceding material in class, you do not really have the foundation. This leads to misassumptions and confusion rather than enlightenment.

I cannot emphasize too strongly the importance of doing your own brief for each major case that we read. (Don’t try to brief all the note cases; you’ll go nuts.) Doing the brief is part of the process of learning to think like a lawyer, and there are no shortcuts that will not impair your chances of doing as well as you can in law school. Having a good brief makes it much easier for you to participate in class discussion, which is one of the keys to doing well.

To be sure, there are lots of study aids out there. They are seductive, because they make you think you really understand how something works when you really haven’t done the hard work that produces deep understanding. That’s not to say that you should never consult a secondary source; of course you should. It’s a question of how to use those sources in a way that helps rather than hurts your development.

C. Class Participation

Class is not primarily a time for me to tell you about the law. It is a time for all of us to engage in discussion about the subject to help you learn to reason like a lawyer. It really is a joint undertaking involving everyone. You play a large part in educating yourselves and in educating one another. Practice making arguments for one side or another. See which side you think should prevail, and then construct the best argument you can for the other side. If you cannot argue the “other” side’s case, then you cannot argue your own properly. Try out your own theories to see whether they stand up to critical examination. Engage in argument with your colleagues, including me.

One of the banes of law school is the limited opportunity for feedback during the semester. Most of the classes are just too large to permit having more than a final examination at the end of the semester. (Unlike your instructors in college, we do not have graduate grading assistants.) You can, however, get constant feedback on how you’re doing by participating regularly in class. Can you follow the discussion? Can you participate meaningfully?
Can you take a position and then either defend it or modify it as we explore it? One of the best ways that I can help you is through class participation, and it's not just helpful for the individual to whom I'm directly speaking at the moment; it benefits everyone.

Your first efforts are almost guaranteed to be inarticulate or confused. That's natural, expected, and we all went through it. You will misunderstand many things. You will make errors. (So will I, and you will catch me, which is great.) There is nothing wrong with errors. Almost always they help us learn, because we can examine them, figure out where we went astray, and avoid similar mistakes in future. There's also nothing wrong with not knowing the answer to a question. A huge part of what we are trying to do in class is to learn how to figure out something when we're not sure. So take a chance. It's fine to answer when you are sure, but it's even more valuable to respond when you're not. That's how we make progress.

I do not grade for class participation in first-year classes. The first year comes with enough anxiety without me adding to it by giving you the feeling that every time you open your mouth you may be putting yourself in jeopardy. I hope that the absence of grade pressure in this respect will make you more comfortable about participating generally.

Some of you may be very reticent about speaking in such a large group. I understand that in my gut because I lived it. It is an awful feeling. Part of being a lawyer, though, is being able to function effectively when you are “on the spot,” because you will often be there. Even if you never step into a court room other than to be admitted to the bar (which is what I was sure would be my career path), you will be a participant in client meetings, negotiations, brainstorming sessions and countless other situations that will require your participation. If this is an issue for you, please come see me, to give me the opportunity to help you with it. It's pretty painless. I guarantee that none of you will be more terrified of participating in class than I was as a first-year law student many æons ago. It doesn't have to be that way, and over the years I think I have helped hundreds of students deal successfully with this issue. Working together we can accomplish a great deal.

D. Laptop Computer Policy

First, I should say that I am as much of a technophile as any of you. I build my own machines and now run Kubuntu (a flavor of Linux) on them with a virtual Windows machine in the background. Computers are enormously useful tools, and I enjoy working with them and on them. Unfortunately, in the law classroom they can be hindrances as much as useful tools. They can interfere with the learning process instead of aiding it. I am not talking now about obviously inappropriate use during class, such as surfing the web, IMing, et cetera. (My assumption has always been that if students want to zone out, they will. Certainly I did as a student—more than I should have.) I suppose laptops are in some way a double threat in that regard, because they not only offer an enormous range of options for zoning out, but also tend to distract students sitting behind the laptop user, or so I've repeatedly been told. That is not the matter about which I was most concerned. The person whose education the laptop in class may harm the most is the user.

Having a laptop is an almost irresistible invitation to become a stenographer, getting every word of the discussion (or, at least, all of the teacher's words) down. There are at least three problems with this approach. The first and largest problem is that getting the most benefit from a law school class requires very active listening and participation. One cannot do that and do stenographic transcription at the same time. Stenographers (including one famous example from the Watergate scandal of 1972-74) regularly report that they have no recollection or understanding of anything that they have “heard” when transcribing. Somehow the material flows from the ears to the fingers without stopping off at the brain. That is absolutely necessary for a successful stenographer, because stopping to think at all about the material interferes with stenography. Taking notes on a laptop subtly but insistently encourages you not to listen critically to the discussion, and then you miss a large part of what
the class is about. Taking notes by hand, in part because it is so much slower for most of you than typing, is valuable precisely because of that fact. You cannot possibly get every word down, and that forces you to decide as the class goes forward what it is important to have in your notes. That is active listening, because you are engaged in a constant process of evaluation. Stenography discourages or prevents active listening because its basic premise is that every word is equally important.

The second problem is that one gets buried so deeply in stenographic mode that the most common response in law classes around the country these days is, “Could you repeat the question?” Students using laptops simply do not (and I strongly suspect cannot) focus on what is going on in class in a way that is useful to them. Worse, after the teacher restates the question, the laptop students all become busy in paging up, down and around to try to find the answer as though it will somehow magically appear. (As Professor David Cole of Georgetown has observed, “Who knows, with instant messaging, maybe it will.”) Answers come through thought and analysis, and computers cannot do either of those; only you can.

Third, a transcript of the course’s 56 hours of class is essentially worthless as a study tool. It is far too much to work with effectively, and students waste too many hours looking for answers in their voluminous “notes” when the answers really are not there at all. The answers have to come from you.

One year I banned laptops from my first-year classroom. Some felt and said that this was inappropriately paternalistic. In some sense, I pleaded guilty, pointing out, however, that any sort of structured teaching is inherently paternalistic; that is one of the advantages of it. We go to a teacher, presumably, because she is an expert who can help us to approach the materials in a usefully structured way. Students in classes that do not have published syllabi complain bitterly about the lack of guidance. You do not expect to buy a 1,200-page book and hear simply that you are responsible for the material in it and that you should approach it in any sequence that looks appealing to you. There are many places in learning where we rely on the teacher’s experience to guide us in what works well and what does not. That is all I was attempting to do. It is not so much the distracted student about whom I was concerned. I was concerned instead about the student who genuinely wants to do a professional job in class but unwittingly sabotages himself. In my experience, students who use laptops in class often are at a distinct disadvantage, and it is self-imposed. It is also avoidable.

I certainly would never take the position that the computer has no value to you as a student. Transcribing notes shortly after class, fleshing them out while your memory is still fresh, can be a wonderful way of recapitulating what went on in class in a manner that will help to cement the material you have covered. I encourage you to do that. In the process, you will find yourself sifting and evaluating the material. It will also help you to identify areas in which you are not clear, or where you may have missed something. Then you can ask classmates or me, before the class fades into something that you did weeks or months ago.

I think, however, that I was shortsighted in banning laptops entirely. You all have grown up digitally, and, for better or worse, computers are an important part of all of our lives and of our profession. Part of the challenge of that is learning to use them correctly, in ways that help rather than hinder what we are trying to do. Accordingly, you may use laptops in class, subject to two caveats. First, if I find that folks are having to ask me to repeat questions unreasonably often and that stenography seems to be the culprit, then the laptops will have to go. Second, if I receive complaints from class members that others are using laptops inappropriately in ways that are seriously distracting, then we will need to make an adjustment. I don’t anticipate either of these things happening, and it’s entirely in your control whether they do or not. I do have to report to you that many of my students have reported to
me (unsolicited) that they were more tuned in to the class discussion without their laptops, so be alert to that possibility.

**THE MATERIALS**

You will notice that our casebook masses nearly 1,500 pages, and the 2013 Supplement has an additional eighty. News flash: we're not going to read them all. We're not even going to try. We have four credits in one semester. I am not attempting to teach a six-credit course masquerading as a four. When we are done, you will have an overview of our constitutional system and the discussions that underlie it and continue to this day. We are not going to rush through the materials, and there will be no “balloon” at the end of the course. We very well may not get to all of the materials on the syllabus. Our project is to learn to think about constitutional problems the way that lawyers and judges do.

Constitutional Law is a dense subject, at least in part because there is less certainty than in other areas of law, and in part because Constitutional Law has an historical-political component, not in the partisan-political sense, but in the sense that politics is what we call the process of any society’s development. As a result, there is more reading in this course than in some others. The syllabus looks more formidable than it is, largely because I list each item individually.

**To handle the reading, it is important to understand the different ways you should read and retain various parts of the assignments.** Different items on the syllabus call for different types of reading. If you don’t pay attention to that, you will make your own job more difficult.

**Syllabus items in bold** signal material you must prepare to discuss in depth in class. **Most items in bold are cases** that represent the current constitutional understanding, and you should read them with the care required for you to present in class and to discuss in depth the reasoning, information, and questions presented. **Some items in bold** are cases and textual material that is important to understand in depth even though they do not represent the current constitutional understanding. There are 416 pages of material that we will discuss intensively in class.

Syllabus items in roman print constitute the bulk of the reading, totaling 577 pages. Their importance is more historical than representative of the current constitutional understanding. They will help you understand the ongoing constitutional conversation, discuss in class the import of the material in bold, and hypothesize intelligently where the conversation might progress from its current understanding.

That totals 993 pages, and the normal reading load in law school courses is about 250 pages per credit. If you read the cases and textual material that appear in roman print on the syllabus properly, you will be able to handle the reading volume.

It is important to have more than a basic understanding of American history to grapple successfully with constitutional cases. None of these cases occurred in a vacuum. It may be very helpful to you to refer from time to time to a good history book to give you a sense of the time in which a particular case arose.

Page references are to Daniel A. Farber, William N. Eskridge, Jr., Philip P. Frickey and Jane S. Schacter, Cases and Materials on Constitutional Law: Themes for the Constitution’s Third Century (5th ed. 2013) and to the 2013 printed supplement. “W/T” means that the materials will available both from my web page and from TWEN®. The assignments for each week will also be available on the web page (and through TWEN®, which will direct you to the same place), and you can send e-mail either to our listserv or to me directly from either location.

Please note that the pages listed for each case include the notes following them in the casebook unless otherwise specifically indicated. **Note also** that the sequence of the syllabus
does not always follow the sequence of the text. I have done some rearranging so that you come to the materials in a way that I think is better organized conceptually. We will not discuss materials preceded and followed by asterisks or non-case textual material from the casebook at length (if at all) in class.

I have set the course up electronically on West’s TWEN®, and you should each register for it. The syllabus, the assignments for each week, and the supplemental materials are available there. TWEN® will also host a listserv, an electronic discussion group in which I hope all of you will participate. There are a number of advantages to having a listserv, not least of which is that it enables me to be more available to you than I could be otherwise. If you have a question or comment that you are not comfortable posting directly to the listserv, please send it to me privately (at DLD@Law.pace.edu). I may post it with a response if I think it raises a particularly important point, but I will strip off all the information identifying you before doing so. Otherwise I will answer you privately.

One of the things that I have found helpful over the years, particularly with students in their first semester, is getting regular feedback on how things are going. I invite you to leave with me after each class a small slip of paper telling me a) the part of class that seemed to you the clearest, and b) the point that seemed to you the most muddled. If enough folks do that, I can get a pretty good sense of how things are going, and I can use our listserv and subsequent classes to try to clear things up. If students are willing to do it, it is very helpful. I think I can give you a better course with that kind of help from you. You need not identify yourself (although it can be useful if you are hung up on something that I can clear up pretty easily in a short conversation); it’s entirely up to you.

Constitutional Law is as much about the Supreme Court of the United States and its role as the primary interpreter of our Constitution as it is about the document—maybe more. The Constitution, after all, takes up only fifteen pages in your text, and what the Court has done with it takes up well over 500 volumes of United States Reports and more than 1,500 pages of severely edited cases.

Reading and analysis of Constitutional Law cases differs from reading and analysis of common law cases. There is some legal doctrine to extract from the cases, to be sure; but Constitutional Law is not so much the pursuit of a discoverable, immutable legal structure as it is about understanding a continuing Supreme Court conversation about who we are, or ought to be, and why. Constitutional Law is different from and more fluid than Common Law. When you learned to understand the Common Law process in the first semester of law school you focused on reading and synthesizing individual cases with the goal of discovering a common law doctrine. In Common Law cases, you focused on the holding of the case and thought a little about the reasoning—but the focus was on the holding. In Constitutional Law there are case results to know, but the focus is on the reasoning in the opinions of the various Justices as they attempt to justify or disagree about the results.

The number of Supreme Court Justices has varied in our history from five to nine. Whatever the number, they have rarely agreed. Very few Supreme Court decisions are unanimous. Even when the Justices might agree about the result in a case, they often disagree about the “why.” In Constitutional Law, the “why” of a decision is almost always more important than the result for understanding the importance and influence of the case. To understand the place of a case in the continuing Constitutional Law dialogue, you must understand not only the reasoning of the majority (or the plurality if there is no majority), but also the reasoning of the dissents (disagreement with the result in the case) and the concurrences (agreement with the result but important enough difference in the “why” to write separately). While you must, of course, know the results of cases and learn to employ the Supreme Court “tests” to begin to present a lawyer’s argument (in court or on an examination), the argument will be incomplete if you do not know and cannot use the reasoning (arguments) of the various Justices in creating those results or employing those “tests.”
Precedent, holding, and dicta have different influences in Constitutional Law from their function in Common Law. In a Common Law subject such as Torts, for example, the holding in a battery case might have little or no influence on the resolution of a negligence case. The Constitutional Law conversation, by contrast, is seamless and continuous. A constitutional issue, idea, or rationale from a commercial case might be used as the rationale in a civil rights case half a century later. Some issues first raised in the early 1800s might recur over the years and still not be resolved completely in the early 2000s. More confusing, an issue might be completely resolved one way and then resolved in an opposite way fifty years later—maybe earlier. The concurrence in an early case might be the rationale in a later case. A dissent in an early case might be the law in a later case.

The key to learning and understanding Constitutional Law is this: pay attention to and become familiar with the arguments. There is always more than one good one and often more than two.

Class sessions begin promptly Tuesdays and Fridays at 9:00 a.m. A student may miss five class sessions for any reason and without explanation. A student who misses six class sessions, for whatever reason, cannot sit for the examination. It is prudent to save a couple cuts for the inevitable traffic tie-up or flu bug that hits toward the end of the semester.

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